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CURRENT TOPICS.

In the case of *Costigan v. Lunt*, argued at the November term, 1878, of the Supreme Judicial Court of Massachusetts, AMES, J., who delivered the opinion of the court says: "It is a well established rule of evidence that in case of the death of a witness who testified at a trial, it may be shown at any subsequent trial between the same parties and upon the same issue, what his testimony was. Any competent witness who heard it may testify what the evidence was. Com. v. Richards, 18 Pick. 434; 1 Phil. Ed. 230, 231. 1 Green Ed. 202; Young v. Dearborn, 2 Fost. 372. * * * The purpose of such secondary evidence is to reproduce the testimony of the deceased witness, in order that the jury may have it as given by him under oath, and as qualified and explained (if such were the fact) upon cross-examination. The witness who, at the subsequent trial, undertakes to give an account of the previous testimony is not at liberty to describe it in general terms, or to say what it was in its general effect. * * * Whether it is sufficient that the new witness should give only the substance of the former testimony, instead of an exact recital of its language, is a question that has been often discussed in the courts of this country. Ruck v. Rock Island, 97 U. S. 694. * * * We see no sufficient reason for departing from the rule laid down by this court in Com. v. Richards, 18 Pick. 434, and in Warren v. Nichols, 6 Met. 261, and re-affirmed in Corey v. James, 15 Gray, 543. Our rule requires that the new witness is to furnish the same testimony which the former witness gave, because it is given to the jury under his oath and it is to be weighed and judged of as he gave it. It must be given to the jury in the language in which it was originally given, substantially and in all material particulars, because that is the vehicle by which the testimony is transmitted, of which the jury are to judge. We do understand this rule to require the *ipsissima verba* of the former witness to be reproduced. He may have testified, speaking in the first person, and his testimony may be repeated as if he spoke in the third person. The language must be given 'substantially and in all material particulars' as he used it, but not necessarily with absolute verbal identity. In the case at bar, the testimony given by Reed appears to us to have been admissible, even under the strict rule adopted by this court. He testified that he could give the 'substance of the words used;' —that the words were 'substantially these;' —and that he thought these were 'the exact words.' He took notes at the time, and had a right to use those notes for the purpose of refreshing his memory."

In *re Hall*, 12 Ch. L. N. 68 decided by the Probate Court of Cook County, Illinois, on the 1st. inst., on the application for the distribution of the estate of the deceased it appeared that he and his wife had been killed together in the Ashtabula Bridge disaster in 1876. No evidence of survivorship was offered, but the question was important as, in the event of his wife not having survived him, his brothers and sisters became his heirs, while if the wife had survived, other parties would be entitled to share the estate. The court held that, in the absence of other proof, they must have died at the same moment; that neither transmitted any rights to the other, and that the next of kin of the husband were therefore entitled. The rule of the common law where several persons perish in the same catastrophe is that no presumption is to be indulged in. It will not raise a presumption by balancing probabilities, either that there was a survivor, or who it was. In this respect the common law differs from the civil law. Under the latter, certain rules prevail in respect to age, sex, and physical condition, by which survivorship may be determined, but nothing can be more uncertain or unsatisfactory than this conjectural mode of arriving at a fact, which from its nature must remain uncertain, and often upon the existence of which the title to large amounts of property depends. There are cases where a strong probability in theory at least would arise, that one person survived another, and perhaps as strong as that there was a survivor,

and yet the common law wisely refrains from acting upon it in either case. It is regarded as a question of fact to be proved, and evidence merely that two persons perished by such a disaster is not deemed sufficient. If there are other circumstances shown tending to prove survivorship, courts will then look at the whole case for the purpose of determining the question, but if only the fact of death by a common disaster appears they will not undertake to solve it, on account of the nature of the question and its inherent uncertainty. It is not impossible for two persons to die at the same time, and when exposed to the same peril under like circumstances, it is not a question of probability very unlikely to happen. At most the difference can only be a few brief seconds. The scene passes at once beyond the vision of human penetration, and it is as unbecoming as it is idle for judicial tribunals to speculate or guess whether during the momentary life struggle one or the other may not have ceased to gasp first, especially when the transmission of title to property depends upon it, and hence in the absence of other evidence the fact is assumed to be unascertainable, and property rights are disposed of as if death occured at the same time. This is done not because the fact is proved, or that there is any presumption to that effect, but because there is no evidence, and no presumption to the contrary. Newell v. Nichols, 12 Hun, 604.

The cases are uniform to this effect, but the expressions of some of the judges in announcing it—as in *re Harris* where the court adopts the presumption that both husband and wife perished at the same moment——might be understood as indicating a presumption of simultaneous death, which is not the rule of the common law. Thus in Rex v. Heuss, 2 Salk. 533, 5 B. & Ad. 91, the court said: "I always thought it the most natural presumption that all died together and that none could transmit rights of property to another." In *re* Selwyn, the court said: "But in the absence of clear evidence, it has generally been taken that both died in the same moment." So the judge in Taylor v. Diplock, 2 Phill. 261, remarked. "I assume that both perished in the same moment" and in Sollerthwarte v. Powell, 1 Curteis, 705, another judge said. "The parties must be presumed to have died at the same time." But these expressions, though ambiguous, are only intended to mean that as the fact is incapable of proof, the one upon whom the *onus* lies fails, and persons thus perishing must be deemed to have died at the same time, for the purpose of disposing of their property. The Lord Chancellor in Wing v. Underwood, 4 De Gex. M. & G. 633, recognized the distinction, and explained the meaning of the rule. In commenting upon a similar expression of the Master of the Rolls to the effect that he must assume that Mr. and Mrs. Underwood both died together, the chancellor said: "From personal communication with his honor, I know that he is is not aware that he ever used such an expression, and all he ever meant to say was that the property must be distributed just as it would have been if they had both died at the same moment." Best in his work on Evidence, after laying down the general rule, states that it is not correct to infer from this that the law presumes both to have perished at the same moment, and adds: "The practical consequence is however nearly the same, because if it can not be shown which died first, the fact will be treated by the tribunal as a thing unascertainable, so that for all that appears to the contrary, both individuals may have died at the same moment."

SUGGESTIONS UPON CODE PROCEDURE AND CODE REVISION.

VI. APPELLATE PROCEEDINGS.

It is proposed to close this series of articles by a few suggestions upon the peculiarities of appellate proceedings, in the reformed system of procedure, and the necessity of some reformatory legislation.

At the common law, as every well read lawyer is aware, the only method of review of the proceedings of an inferior court by a superior appellate court was by writ of error, by which the whole record, including the pleadings and enteries and whatever else had been placed in the record of the lower court by bill of exceptions, was brought before the appellate court for review, upon questions of law only, upon an assignment of errors, specifically pointing out the errors complained of. This might be done formerly without any motion for a new trial, even where the alleged

error arose upon the trial, and the overruling of a motion for a new trial grounded upon the insufficiency of the evidence could not be assigned as error, and this rule still prevails in the Supreme Court of the United States. Under the chancery practice cases were reviewed upon appeal and the evidence being in writing thereby became part of the record, and the appeal was simply a hearing *de novo* upon the evidence, involving questions of law and fact alike, as upon the hearing below. It would be singular indeed if the blending of two such systems did not produce embarrassment, if not confusion.

In those States in which the distinction between law and equity has been totally abolished, and the abolition applies to the whole procedure—the trial included—the appeal is the only method which could be made available to preserve a review in any case upon questions of fact where the case in question was formerly cognizable in equity. Hence in code procedure the appeal is the method of review usually provided, but it combines some of the features of the former writ of error which are very easily and naturally engrafted upon it, and the practice in code appeals in the appellate court itself is exceedingly simple. But the difficulty arises in saving error and preparing the case for appeal, in the court below. The two systems thus blended with an occasional narrow restriction and a technical construction necessarily cause confusion. Indeed the code procedure, so far as saving error in the progress of the cause and making it available are concerned, is far more difficult than it was either at law or in equity under the former system.

We propose to call attention to two or three prevalent rules which produce inconvenience, expense and delay, and which render the practice in this particular branch technical, complicated, and difficult to all inexperienced lawyers, and make it only attainable to men of high attainments and ripe experience. Some of these technical niceties were discussed in a former number of this series, and what was said need not here be repeated. But one of the most prolific causes of blundering and confusion is the introduction of new rules concerning the motion for a new trial, which have not been considered.

It had been fortunate had the codifiers in some of the States been more conservative and less narrow and specific in many of the provisions concerning new trials. The fault of making provisions too specific and narrow has been already fully discussed elsewhere. But its application here being peculiar it will be alluded to only as applicable to new trials. Before the code, no written causes for a new trial were required; the defeated party made his motion based upon erroneous rulings on the trial, misdirection, misconduct of the jury or prevailing party, after discovered evidence or what not, and the particular grounds were mere matter of argument, and if the motion was overruled the defeated party took his bill of exceptions and whatever error was shown in the record was available upon a writ of error. Of course, in equity the application was not for a new trial, but a rehearing. Under the new system there are a large number of causes for a new trial specifically enumerated, but this enumeration is sufficiently comprehensive to embrace all the grounds existing under the common law system as well as those naturally arising in cases formerly denominated equity cases—the formula, however, conforming in this respect to the common law forms. It would, perhaps, have been better not to have changed the practice in new trials in any respect, but to have in a very general way re-enacted the common law rules. The insufficiency of the evidence was good ground for a new trial at the common law, though a refusal to grant it could not be assigned for error, it being thought that this should be left to the discretion of the trial court. But to have met the emergency of the equity cases a provision making the improper refusal of a new trial assignable as error on appeal might have been introduced.

But while this view seems to us the better one, yet as this enumeration so closely follows the common law rules we are not prepared to say that it is mischievous, or that it ought to be changed or modified; once settled it is better to remain. But the criticism applies to the requirements of a written specification of the causes, and the technical rulings under it. These specifications called causes for a new trial are in the nature of an assignment of errors in part. Sometimes an accusation

against the judge or prevailing party or both. These causes for a new trial must point out the particular grounds relied upon, and unless this is done such errors as constitute grounds for a new trial are forever waived. It matters not that there is error in suppressing or allowing testimoney, or the grossest misdirection, or any other error in rulings in the progress of the trial and that the same has been duly saved in the bill of exceptions, and is specifically assigned for error upon appeal, yet unless the particular error be pointed out in the causes for a new trial no advantage can be taken of it. The requirement of the written causes is legislative, the construction establishing these excessive niceties is judicial.

Another class of rulings in this same line and connected with the same subject is that where error is reserved and placed in the record by bill of exceptions and assigned as a cause for a new trial. The only method of making the error available in the appellate court is by assigning error upon the rulings of the court upon the motion for a new trial, and if the ruling itself be assigned for error it will not be considered. To illustrate, let it be conceded that the only error in a case is misdirection. This is the only cause assigned for a new trial, the misdirection was excepted to and the instruction and the exception duly appear in the bill of exceptions. If the error be assigned in the appellate court upon giving the instructions it will receive no attention, but it must rather be assigned upon the rulings of the court in refusing a new trial. These mysteries in code enactments and code rulings have caused suitors immense sums of money, great vexation and delay, and unless absolutely necessary ought to be simplified, and the complication and mystery ought to be excluded by legislative enactment. All this excessive certainty and exactness, even once mapped out by decisions, affords, as we have several times observed of similar cases, an occasion for stumbling which will be perpetual with all but the few.

Here we find a departure from all the known methods of practice under the old system. Where a case is taken to the appellate court for error arising upon the trial, there must be a specific assignment of causes more specific, more exact and literal than was ever required in the assignment of errors, and then none of these errors can be assigned specially, but the general one upon the refusal of a new trial alone must be assigned. Whether we are right in concluding that such a system is a perpetual source of blundering and ought to be changed, let the digests in the code States answer. Before proceeding to point out the methods of reformation which occur to us as practicable, let us for a moment note the grounds upon which this excessive nicety is sought to be justified. It is said that fairness to the court requires that rulings made in the excitement of a *nisi prius* trial, should be brought in review before the judge upon a motion for a new trial, so that he may examine the questions passed upon in a more deliberate way than the same can be done at the trial. "Fairness to the court," is whatever promotes the right administration of justice. But the insisting upon this strictness in the assignment of causes for a new trial in practice promotes no such a thing. Nearly every question of law arising upon a trial is usually contested and argued at the time, the result is when a new trial is asked counsel who prepare the causes assign every thing they think available, and not once in ten times are these written causes ever exhibited, or does the court ever see them. The court is directed to the point relied upon by argument, and it would promote justice as much to confine the assignment of errors in the appellate court to points made in argument as to confine it to points not only presented in the record but causes describing those points with the certainly required in describing an instrument in an indictment for perjury.

As we feel that this subject is one of great importance, we may be pardoned for giving an illustration which shows the utter impracticability of accomplishing the purpose claimed for this nicety in specification, and also to show by its impracticacility that the construction adopted could never have entered the heads of the framers of the codes. If the cause assigned for a new trial be that the verdict is contrary to law, the illegality need not be pointed out, and so the court is not informed as to what particular part of the record the cause assigned applies. If the cause be assigned that the verdict is not sustained by sufficient evidence, the defect in the evidence

need not be pointed out, and yet the omission may be purely technical as the neglect of counsel in the excitement of a trial to read some document which he has on the table, exhibited and treated as valid and in evidence, which is essential to his recovery or defense. The attention of the court is by no means called to it, either by the causes for a new trial, or by the argument of counsel, and yet it may be upon the assignment of error of the lower court in overruling a motion for a new trial, based upon this cause that the case is reversed——reversed upon an omission to which the attention of the court was never called. This illustration points to two things. First, that it is utterly impracticable to accomplish the object claimed to be reached by these technical requirements, and secondly, that such a construction was hardly contemplated by the code.

The remedy for the evil we have discusssed is simple and easy. Let it be enacted that a general assignment of causes for a new trial sufficiently certain to indicate the class to which the cause assigned belongs, and where the cause assigned is error of law, etc., misconduct etc., the class of errors etc., or misconduct etc., to which the cause assigned belongs shall be assigned in general terms. Let us see for a moment how this would operate; let it be supposed that the cause assigned is error of law occuring at the trial. The cause would read thus: "For error of law occurring at the trial in the improper admission of evidence (or in the improper exclusion of evidence; or in the improper giving of instructious; or in the improper refusal of instructions; or in improperly awarding the opening and close of the case" etc.) Again suppose the cause should be after discovered evidence, misconduct of the jury or prevailing party or the like, the cause would be thus assigned. "Because of newly discovered evidence as shown by the affidavits herewith filed" (the affidavits being made part of the record without a bill of exceptions as they should be, as we have seen). Or, "because of misconduct of the jury, (or prevailing party) as shown by the affidavits herewith filed."

These illustrations sufficiently show our views as to the necessity of certainty. If any written causes are proper, and we concede that they perhaps are, all that is necessary to advise the court and the adverse counsel who are always familiar with the case having witessed the trial, is found in this general assignment of causes. A. I.

LANDLORD AND TENANT—LIABILITY FOR DEFECTS IN LEASED PREMISES.

ANDERSON v. KRYTER.

Indianapolis Superior Court, General Term, November, 1879.

The liability of a landlord for injuries to third persons in consequence of defects in premises leased, ceases with the commencement of the tenant's occupation. But when the landlord has covenanted to repair, he is liable to the same extent that he would be if in actual occupation of the premises himself, upon the principle that by his covenant to repair he holds out to those in the lawful occupation of the premises an implied assurance that they are safe and an implied invitation to use all parts of them.

HOWE J., delivered the opinion of the court:

The only question in this case is as to the sufficiency of the complaint to which the special term sustained a demurrer, upon the ground that it did not state facts sufficient to constitute a cause of action. The material portions of it are as follows: That for a long time before, and upon the 16th day of October, 1878, the defendant was the owner of the house and premises known as No. 338 South New Jersey street, in the City of Indianoplis Indiana, which were on that day occupied by one George Daniels as the tenant of said Kryter who had agreed, as part of the contract of lease, to keep the premises in repair and in a proper condition for use. At the rear of the premises and within the boundaries thereof, there was an outhouse which had been erected over a vault excavation in the earth, and which, from long use, had become filled with night soil and excrement. The building itself was old and the joists supporting its floor, and the boards of the floor themselves, had become rotten and insecure and dangerous, and the defendant Kryter, before the date mentioned, had been notified that the floor was rotten and dangerous, but had neglected and failed to repair it, and make it secure, though requested so to do by said Daniels, and had agreed to repair it and make it safe for use, and left it in this rotten and dangerous condition. That in the eveuing of the 16th day of October, the plaintiff, who was then in the employ of said Daniels as a house servant, having need to go into said outhouse and being unaware of the dangerous and rotten condition of the floor etc., entered the building, in a careful and proper manner, and stepped upon the floor, when the same gave way and she was plunged into the vault below and into the filth it contained, and was almost strangled before she was extricated therefrom. The complaint then goes on to describe th

particular injuries received and concludes with the ordinary prayer for relief.

I presume nobody will question the general rule that the liability of a landlord for injuries received by third persons, in consequence of defects in premises leased, ceases as soon as the tenant commences occupation. This general rule must be regarded as quite well settled. Taylor L. & T., 7th ed. § 175; 6 Am. Law Rev. 614; Cooley on Torts, 609; Leonard v. Storer, 115 Mass. 86; Shindelbeek v. Moon, 17 Am. Law Reg. N. S. 450.

But there seems to be some exceptions to the general rule as well settled as the rule itself. One is that the landlord is liable for injuries received by third persons to the same extent that he would be if in the actual occupation of the premises himself, when that which caused the injury was at the time of the lease a nuisance and dangerous, *per se*, and did not become so merely in consequence of the manner in which it was used by the tenant. Taylor L. & T. 7 ed. § 175; 14 Eng. Rep. (Moak's ed.) 496, note. In such cases it makes no difference that the tenant was in exclusive possession and that the landlord was not bound to repair. Shear. & Red. on Neg. 3 ed. 502; Swords v. Edgar, 59 N. Y. 28; Shindelbeck v. Moon. *supra*.

But I am of the opinion that the allegations of the complaint do not bring it within the authorities above cited. For ought that appears the floor over the vault in question may have been sound and perfectly safe when the premises were leased.

Another exception to the general rule is where the landlord has covenanted to repair. Taylor L. & T. 7 ed. 175; Cooley on Torts, 607; 1 Add. Torts, Wood's ed., 266, 240; Payne v. Rogers, 2 H. Blk. 349; Fisher v. Thirkell, 21 Mich. 1; 4 Am. Rep. 422; Bigelow's Lead. Cas. on Torts 627; Campbell v. Sugar Co. 62 Me. 552; 16 Am. Rep. 503; Nelson v. Liverpool etc. Co., L. R. 2 C. P. Div. 311; s. c. 21 Eng. Rep. 208; 5 Cent. L. J. 312; and note upon same case in 16 Alb. L. J. 216.

The true principle upon which is based the exceptions to the general rule making the landlord liable in such cases is, I think, to be seen in the reason of the general rule itself, which, as I have before said, excepts the landlord from liability after the occupation of the tenant has commenced. The reason of the general rule is that during the continuance of the lease the landlord has no control of the premises, and has no right to enter, even to make repairs, and that it would be unjust to hold the landlord liable for defects which he has no legal power to remedy. Shindlebeck v. Moon, *supra*. But when the landlord has covenanted to repair the reason of the general rule ceases. He then has a right to enter to make repairs whether the tenant is willing or not. Kellenberger v. Foresman, 13 Ind. 475.

The liability of the landlord is not founded upon any idea of privity of contract, and showing that there is no privity of contract will not, therefore, prove that the injured party has no right to recover. The liability is founded upon the theory that when the landlord has covenanted to repair he has the right to enter for that purpose and to that extent the premises though in the occupation of a tenant or within his control, and he becomes liable to the same extent, but no further, that he would be if in the actual occupation of the premises himself. See 6 Am. Law Rev. 627; 62 Me. 552. I say that the landlord is liable in such cases to the same extent and to the extent only that he would be if in the actual occupation of the premises himself.

The liability of the landlord when in occupation of the premises himself is not founded upon any theory of privity of contract. It is based upon the same general principle which makes railroad companies liable for holding out invitations to a traveler to cross over a private crossing belonging to the company by inducing him to believe it is safe, as illustrated by the case of Sweeny v. Old Colony R. Co. 10 Allen 358, and the cases cited in the opinion rendered by this court on Feb. 3, 1879, in the case of Yundt v. P. C. & S. L. R. Co., and which renders the owners of premises upon which they permit to remain unguarded dangerous excavations, spring guns, etc., liable to those whom by invitation, express or implied, they may invite there, or whom they may reasonably anticipate will lawfully come there. See the valuable note of Mr. Thompson in 26 Am. Rep. 562. To what extent the defendant might have been liable under circumstances other than those disclosed in the complaint, I need not discuss. Here it appears that she was a domestic in the employ of the tenant at the time of the injury complained of. When the defendant leased the premises she was included in the implied invitation to use them, and was entitled to protection equally with the tenant himself, his wife and children. By covenanting to repair the defendant held out to the tenant and his family and servants in the lawful occupation of the premises an implied assurance that they were safe, and an implied invitation to use all parts of them, and for injuries received by any of them he is liable, not because of any contract or covenant with the tenant, but because he held out to them an invitation to go where they had no reason to believe it unsafe to go, but where in fact it was unsafe to go, he having the right by virtue of his covenant to make it safe, and it being in consequence of his own neglect that it was not safe.

I am for reversing the judgment of the special term with directions to overrule the demurrer to the complaint.

Judgment reversed accordingly.

MURDER — INDICTMENT — CRIMINAL PLEADING AND PRACTICE.

STATE v. BLAN.

Supreme Court of Missouri.

[Filed May 19, 1879.]

1. INDICTMENT FOR MURDER CHARGING ASSAULT. —An indictment for murder may charge the assault to have been made with several kinds of weapons.

2. PRINCIPALS IN FIRST AND SECOND DEGREES.—An indictment that A gave the mortal blow, and that B was present aiding and abetting, is sustained by evidence that B gave the mortal blow, and A was present aiding and abetting, and it is wholly immaterial whether it is correctly stated in the indictment that either or both did it.

3. CRIMINAL PRACTICE — STATUTE OF JEOFAILS.—The concluding clause "nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits" of Wag. Stats., p. 1090, sec. 27, *held* to be limited to the imperfections of the class or character previously enumerated.

4. WHAT INDICTMENT FOR MURDER MUST ALLEGE.—An indictment for murder must allege an assault and the nature thereof, a mortal wounding of the deceased, and that the deceased died of such wounds within a year and a day, and the averment that "the defendant did kill and murder" the deceased, without averring that he died of the wounds, is but a statement of a legal conclusion, and is insufficient.

5. DESCRIBING WOUNDS AND WHERE INFLICTED —SEVERAL COUNTS AND GENERAL VERDICT. — The doctrine, in this State, that an indictment need not describe the wound, nor state the part of the body on which it was inflicted, and also that where there are several counts charging the same offense, one good count will sustain a general verdict of guilty, reaffirmed.

6. OBJECTIONS TO EVIDENCE.—Objections to the introduction of evidence can not be made for the first time in the court of last resort.

Appeal from the St. Louis Court of Appeals.

R. A. Buckner, for appellant *W. A. Alexander*, and Atty. Gen. *Smith*, for State.

HOUGH J., delivered the opinion of the Court:

At the September term, 1878, of the St. Charles Circuit Court, John Blan and Joseph Blan were jointly indicted for murder in the first degree in killing one Elizah Warren. Joseph Blan was acquitted, John Blan was convicted of murder in the first degree and sentenced to be hanged. The judgment of the circuit court was affirmed by the Court of Appeals and the defendant has appealed to this court.

The indictment contains five counts.

The first count charged that John Blan and Joseph Blan, etc., "with sticks, clubs, loaded guns and other deadly weapons which they the said John Blan and Joseph Blan, in their hands then and there had and held, him the said Elizah Warren, in and upon the head and face of him the said Elizah Warren then and there feloneously, wilfully, deliberality and premeditatedly, on purpose and of malice aforethought, did strike, cut and hit and shoot, giving unto him the said Elizah Warren then and there with the said sticks, clubs and guns and other deadly weapons in and upon the head and in and upon the face of him the said Elizah Warren several mortal wounds of the length of two inches each and of the depth of six inches each of which said mortal wounds the said Elizah Warren then and there instantly died. And so the grand jurors aforesaid upon their oaths aforesaid do say that the said John Blan and the said Joseph Blan in the manner and form aforesaid, him the said Elizah Warren, feloneously, wilfully, deliberately, premeditatedly, on purpose and of their malice aforethought, did kill and murder, against the peace and dignity of the State." The second count charged that the defendants did kill and murder the deceased, by striking, hitting, and mortally wounding him, with sticks and clubs. This count contained no express averment that Warren died of the wounds so inflicted, nor were the wounds described. The third count charged that the defendants did shoot, kill and murder the deceased with loaded guns, but contained no description of the wounds inflicted and no express averment that the deceased died therefrom. The fourth count charged that the defendants assaulted the deceased with sticks, clubs and loaded guns, and did kill and murder him by striking him with clubs and shooting him with guns. This count like the second and third contained no description of the wounds and no express averment that the deceased died therefrom. The fifth count contained no description of the wounds inflicted, but in other respects is substantially the same as the first.

The first count is objected to as being vague and uncertain as to the manner of the assault and as being faulty in not separately stating the individual acts of each of the defendants. There is no force in these objections. It is well settled in this State and held elsewhere, that an assault may be charged to have been made with several different kinds of weapons. State v. York 22 Mo. 462. State v. McDonald, 67 Mo. 13: State v. Painter, 67 Mo. 85. Com. v. Macloon, 101 Mass. 1; State v. McClintock 1 G. Greene, 393; State v. Baker, 63 N. C. 276.

In an indictment for murder if two be charged as principals, one as the principal perpetrator and the other as aiding and abetting, it is not material which of them be charged as principal in the first degree as having given the mortal blow. 1 Whart. Crim. Law., §129. If, therefore, an indictment that A. gave the blow, and B. was present and abetting is sustained by evidence that B. gave the blow, and A. was present aiding and abetting, it is wholly immaterial whether it is correctly stated in the indictment that either or both did it. In State v. Dalton, 27 Mo. 14, the indictment charged that John Dalton and Michael Gaughy feloniously and wilfully made an assault upon one Charles Haufmeister, "with a certain knife of the length of six inches and of the breadth of two inches, which they, the said John Dalton and Michael Gaughy then and there, in their right hand held with the intent" etc.. and the indictment was held legally sufficient to sustain a conviction. We are of the opinion, therefore, that the objections to the first count are untenable.

The second, third, and fourth counts are objected to because they contain no allegation that the deceased died of the wounds charged to have been inflicted by the defendant, and do not describe said wounds. In the case of Alexander v. State, 3 Heisk. 475, an indictment stating time and place and charging that "the defendants assaulted and then and there unlawfully, deliberately, premeditately, feloniously and of their malice aforethought did kill and murder" the deceased was held to be sufficient under the provisions of the code of Ten-

nesee relating to indictments. In Cordell v. State, 22 Ind. 1, the indictment charged that the defendant did kill and murder the deceased by cutting, stabbing and mortally wounding him, but omitted the averment that the deceased died of the wounds so inflicted; the court said: "We think the indictment sufficient under the code. It shows the death of the assaulted individual; the word murdered *ex vi termini* imports death." In Pennsylvania it is declared by statute that it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but that it shall be sufficient to charge that the defendant did feloniously, wilfully and of his malice aforethought kill and murder the deceased. Rev. Acts 1860, p. 435.

Our statute provides that no indictment shall be deemed invalid, nor the judgment thereon arrested, "for want of the averment of any matter not necessary to be proved, nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Wag. Stat. 1090, §27. The section in which the foregoing provision occurs enumerates various trivial and formal defects, and concludes with the clause quoted. In the case of State v. Pemberton, 30 Mo. 376 this court in construing this section held that the concluding clause should be limited in its application to imperfections of the class or character previously enumerated. The court said: "If the design of our legislature had been to change the entire system of criminal pleading, they undoubtedly would have supplied a substitute for the one abolished. They have done so in civil proceeding, but in criminal proceedings changes, when made, have been specific. The ancient forms of proceeding have been retained with specific modifications; and it is only from the clause we are now called upon to construe that any inference can be drawn of a design on the part of the legislature to abolish the entire system of criminal pleading. To give so liberal and latitudinous a construction to this clause would undoubtedly destroy many, if not all the forms which have been hitherto observed." And the court declined to construe the statute.

"It is indispensably necessary," says Mr. Wharton, "to state that the death ensued in consequence of the act of the prisoner." Whart. Crim. Law 7th ed. §285; State v. Wimberly, 3 McCord, 190, and it is clearly inadmissable to allege simply a legal conclusion. It has been decided that it is no longer necessary in this State to describe the wound or to state on what particular part of the body the wound was inflicted. State v. Edmundson, 64 Mo, 398. But it is necessary under our statute to allege the substantive facts necessary to be proved. It is necessary, therefore, in a case like the present to allege an assault, and the nature thereof, a mortal wounding of the deceased, and that the deceased died of such wounds within a year and a day. These facts being properly stated the legal conclusion therefrom may then be stated that the defendant did kill and murder the deceased. Nothing short of this will, in our judgment, secure to the defendant his constitutional right to be informed of "the nature and cause of accusation." In the case of People v. Jacinto Aro, 6 Cal. 207, the indictment charged that the defendant did kill and murder the deceased with a Colt's pistol and a dirk knife, but it contained no description of the offense nor statement that the deceased came to his death by the wounds inflicted. The court said: "Murder is a conclusion drawn by the law from certain facts, and in order to determine whether it has been committed, it is necessary that the facts should be stated with convenient certainty, for this purpose the charge must contain a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation, lest the grand jury should find a bill for one offense, and the defendant be put on his trial in chief for another. In this particular at least it may be safely said that our statute has not altered the common law, and no one, I apprehend, would maintain that under the old system of practice either in England or the United States, the allegation of a legal conclusion, instead of the facts which are the predicate of the conclusion ever has been held sufficient" and the indictment was held to be defective. The provisions of the criminal practice act of California at a late period, however, were held to authorize a departure from the law thus laid down. People v. Sandford, 43 Cal. 29. But this fact does not impair the force of the reasoning in the case cited. There is a growing disposition on the part of the courts to discourage useless formality in pleadings in criminal as well as civil proceedings, but care should be taken not to dispense with matters of substance under the guise of discarding mere matters of form. *Vide* State v. Sides, 64 Mo. 383; State v. Lakey, 65 Mo. 217; State v. Steeley, 65 Mo. 218; State v. Mayfield, 66 Mo. 125.

We are of opinion, therefore, that the second, third and fourth counts are defective. The first and fifth counts, however, are good. And under the rule which obtains in this State, when there are several counts charging the same offense, one good count will sustain a general verdict of guilty. State v. Jennings, 18 Mo. 435; State v. McCue, 39 Mo. 112; State v. Pitts, 58 Mo. 556; State v. Baker, 63 N. C. 276.

It appears from the evidence that John and Joseph Blan, were half brothers of Mrs. Warren, the wife of the deceased. John Blan and the deceased had quarreled in the town of Alton, on the day of the homicide. John and Joseph Blan returned to the house of the deceased about seven o'clock in the evening. The deceased returned about an half hour later and finding John there, said: "I didn't think you would be caught here" and drew a revolver, but so far as the record shows did not attempt to use it. John ran off and Joseph remained as he states about five minutes when he left also. About ten minutes after Joseph left, John came suddenly upon the deceased from behind while he was sitting in a chair in front of and near the corner of his cabin, and struck him a heavy blow upon the head with a club, Warren fell forward upon his kness. He arose exclaiming, "My God! children I am killed" and after walk-

ing a few feet fell again. After his wounds were dressed he went to bed, and about an hour later the family retired for the night. After striking the deceased with a club, the defendant went to the house of a neighbor, two miles distant, and borrowed a loaded doubled barreled shot gun. The testimony strongly tends to show that he then went to his own house which was near by, left Joseph there and went immediately to the house of the deceased, entered the cabin while all were asleep, and discharged a heavy load of shot in the face of the deceased. The family were aroused by the report of the gun and Elizah Warren was found to be dead.

Joseph Blan who was a witness for the defendand testified on his cross examination to certain angry words uttered by the defendant to the deceased, in the quarrel at Alton, and two witnesses were called by the State to contradict, Mrs. Blan, the mother of the defendant and a witness for him as to certain immaterial and irrelevant statements made by her in relation to that homicide—all this testimony was admitted without the slightest objection from the defendant or his counsel, and its admission was not even made a ground of complaint in the motion for a new trial. We are now asked to reverse the judgment in this case because of the admission of this evidence and it is earnestly insisted upon the authority of State v. Davis, 66 Mo. 684, that the defendant can not waive any right or be prejudiced by any failure on his part to object to the introduction of testimony. While the testimony now objected to is perhaps irrelevant, it was not at all essential to the conviction of the defendant, and taken altogether could do him no harm. But if it were otherwise; if the testimony now complained of had been prejudicial to the defendant, it would be a dangerous practice and one fatal to the administration of the criminal law and the peace of society, to permit objections to the introduction of testimony to be made for the first time in a court of last resort. Such a practice could not be tolerated, and State v. Davis is no authority for it. That decision which is undoubtedly correct, relates to proceedings prescibed by statute for the protection of the prisoner of an entirely different character, and a waiver of objections to testimony is by the very language of that decision impliedly excepted from the rule there laid down. In this State the prisoner may be a witness in his own behalf and is subject to cross examination like any other witness, and if the rule now contended for should receive our sanction it would be utterly impossible ever to obtain a conviction which would stand and the criminal law of the State would become a dead letter, The prisoner himself would only have to state in his testimony in chief or on his cross examination some incompetent and irrevelant matter highly prejudicial to himself, and then after conviction ask a reversal of his sentence at our hands for having done so; for the error of its admission could not be cured by the trial court, by instructing the jury to disregard it. State v. Rothschild, 68 Mo. 52. State v. Daubert, 42 Mo. 242; State v. Marshall, 36 Mo. 400; State v. Mix 15 Mo. 153; State v. Wolf, 15 Mo. 168. The testimony contained in the transcript before us, is amply sufficiently to sustain the verdict and the instructions of the court are unobjectionable.

The judgment of the Court of Appeals will therefore be affirmed.

COMMON CARRIERS — CONTRACTS RESTRICTING LIABILITY—EXPRESS COMPANY.

BOSKOWITZ v. ADAMS EXPRESS COMPANY.

Supreme Court of Illinois.

[Filed at Ottawa, Sept. 26, 1879.]

1. EXPRESS COMPANY—LIMITATION AS TO VALUE—CONSTRUCTION OF "PACKAGE."—Three bales of furs were delivered to an express company for transportation, the receipt given by the company limiting its liability to $50, for any loss or damage to any box, package or thing, unless the just and true value thereof was therein stated: *Held*, that the shipper, even though no disclosure of value had been given, was entitled to recover $50 on each of the three bales.

2. RECEIPT—CONSTRUCTION.—The receipt whose conditions the company relied on in this case was a blank of the United States Express Company and was prepared by the plaintiff's bookkeeper, the word "Adams" being written in place of "United States." The goods were described, but not valued. Among the conditions was one providing that the United States Express Company would not be liable for more than $50 on each package, unless the true value was stated. *Held*, that the receipt construed literally was not a contract between the parties, and that it was error to declare as a matter of law that it was to be read as though the words "United States" were not in it.

3. CONTENTS OF RECEIPT — PAROL EVIDENCE.—To overcome the valuation clause in an express receipt, the plaintiff offered evidence to prove that the defendant, through its agents, had solicited his patronage on the same terms as other companies, viz., that the goods in which he dealt should be taken on non-valuation rates, which offer the court rejected: *Held*, error.

4. ASSENT OF THE SHIPPER to the terms of a receipt in derogation of the carrier's liability, is a question of fact for the jury under all the circumstances of the case.

5. LIABILITY OF EXPRESS COMPANY FOR NEGLIGENCE OF RAILROAD. — An express company, notwithstanding a contract made with a shipper in limitation of its liability as a common carrier, is liable for loss or damage caused by the negligence of a railway company, or its agents employed by it. The failure of the railroad company to use the most improved platforms is negligence of this character.

On petition for rehearing.

SCOTT J., delivered the opinion of the court:

Plaintiffs brought their action against the Adams Express Company to recover the value of three bales of furs delivered to the company for transportation from Chicago to New York. The goods were never delivered to the consignees but were destroyed *en route* by fire, caused by the wreck of

the train, occasioned by a broken rail. As to the delivery of the goods to the carrier, their value and destruction by fire there is no disagreement.

The receipt taken by the shippers at the time of the delivery of the goods to the carrier was filled up by an employee of plaintiffs, and was presented with the goods for the signature of an agent acting on behalf of the company. The blank used for that purpose was one of a large number furnished by the United States Express Company to its customers. In the receipt prepared by the bookkeeper of plaintiffs for the goods to be shipped, the word "Adams" is written over the printed words "United States" so as to make it the receipt of the Adams Express Company. A line made with a pen was drawn over the blank left for stating the valuation of the goods. The articles mentioned in the body of the receipt are "three bales said to contain peltries." On the upper left hand corner of the receipt is stated in figures, the separate and total weights of the three bales, and also "two bales mink" and "one bale skunk," but there is a conflict in the testimony as to when these latter words and figures were placed there, whether before or after it was signed by the agent of the company.

Among the printed conditions of the receipt is the following. "And it is hereby expressly agreed that the said United States Express Company are not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage to any box, package or thing for over $50, unless the just and true value thereof is herein stated." The contention is whether this clause of the receipt limits the right of recovery in case of the loss of the goods to the sum of fifty dollars because the true value was not stated therein, or whether plaintiffs notwithstanding the restriction as to the extent of the carrier's liability can recover the full value of the goods as shown by the evidence. Plaintiffs base their right to recovery on two propositions: *First* that under the facts of the case it was not their duty to make known to the carrier the valuation of the goods and *Second*, that even if it was their duty, the omission to make such disclosure can not be urged to limit a recovery for loss of goods caused by the carrier's own negligence. On the other hand defendant rested the defense upon the letter of the contract relying upon what it understood to be a rule of law applicable to the case, that it was incompetent for plaintiffs to contradict or vary the terms of the contract as embodied in the receipt given by the carrier for the goods.

Upon the questions involved the court instructed for defendant that the issues submitted were, whether the furs were lost or destroyed by reason of actual negligence of defendant, and if no negligence is proved, then if the goods while in the course of transportation were destroyed by an unforseen casualty against which ordinary prudence could not provide, it was the duty of the jury to assess no greater damages than $50, the sum stated in the limitation clause of the contract, and that the receipt in evidence must be regarded and treated as a binding contract between the parties in each and all its provisions, and that it should be read as though the words "United States" were not in it. The court however refused to give for plaintiffs the reverse proposition as it was asked to do, that the conditions and restrictions contained in the receipt were not binding upon plaintiffs so far as they purported to limit the carrier's common law liability unless plaintiffs had knowledge of such restrictions and assented to them. Under the charges given, the jury no doubt felt compelled to assess plaintiffs damages at no greater sum than $50 which they did.

As we have seen, the goods destroyed consisted of two bales of fine and one of coarse furs—all distinct packages—and each proven to be of a value in excess of the sum named in the restricting clause of the receipt. It will be observed the limitation is as to "any box, package or thing," and as each package or bale exceeded in value $50 there is and can be no reason why in any view that may be taken of the legal effect of the alleged contract plaintiffs can not recover that sum for each "package" destroyed. It makes no difference that the several distinct packages were all embraced in one receipt; they are nevertheless distinct packages. In limiting the amount of recovery, in case no negligence was proven, to fifty dollars, as was done by the court in its instructions, there was manifest error for which the present judgment must be reversed even if no other cause existed.

The question of the most importance in the case is whether, as a matter of law, the receipt in evidence is to be treated as a binding contract between the parties in each and all its provisions.

Construing the receipt literally it contains no contract between the shippers and defendant that in any manner limits the carrier's common law liability, as to the amount of the recovery in case of the loss of the goods. That which is said to constitute such contract is contained in the printed part of the receipt, and is with the United States Express Co., and not with defendant. A case bearing a close analogy to the one in this particular is Merchants Trans. Co. v. Bolles, 80 Ill. 473, where the receipt given for the goods contained exemptions in favor of other companies and it was ruled the carrier receiving the goods could not take the benefit of such exemption in the receipt. It is a proposition so plain it will not be controverted that defendant can claim no exemption from liability for the loss of the goods as a common carrier except such as is given by express contract. Neither in the written or printed part of the receipt is there any express contract making exemptions in favor of the defendant company. Before defendant can claim the benefit of the exemption contained in the contract with the "United States Express Company," it must appear it was the agreement of the parties, and that can only be shown by evidence. In the absence of evidence establishing that fact it was error for the court to declare as it did as a matter of law, that the receipt given for the goods was to be read as if the words "United States," were not in it.

The other proposition stated, *viz.*, "that the receipt must be regarded as a binding contract between the parties in each and all its provisions,"

is the one most discussed. The rule of law adopted and uniformly adhered to in this State is that a clause in a receipt given to the shippers of goods limiting and restricting the carrier's common law liability incident to its general employment, if understandingly assented to be by the owner will as effectually bind him as though he had signed it. Whether such restrictions have been assented to in any given case is always a matter of evidence. The cases in this court that declare this doctrine are referred to in Erie R. Co. v. Wilcox, 84 Ill. 231, and it is not necessary to repeat the citations. When a carrier seeks exemption from any common law liability annexed to its employment the contract must be assented to by the shipper with a view to release the duties imposed, and when the exemption is once established the carrier, in case of loss, will only be responsible on account of negligence or wilful misconduct. The law has wisely and for reasons that concern public interests inhibited a common carrier of passengers or freights from contracting against its own negligence, and notwithstanding it may be so expressed in positive terms in the release, it is not to be read as providing against losses or injuries arising from actual negligence. No argument is made against the correctness of this proposition of law, but its applicability to the case at bar is denied, for the reason, it is said, that the receipt containing the exemption insisted on was prepared by the owner of the goods ready for the signature of the agent of defendant, and they must be held to be conclusively bound by its provisions, and the court as we have seen charged that as a matter of law the receipt was a binding contract between the parties in each and all its provisions. The case of Oppenheimer v. United States Express Co. 69 Ill. 62, is cited as giving sanction to the view of the law taken by the court below. That is a misapprehension of what was decided in that case. While that case declares legal certain rules designed to secure good faith between the shipper and the carrier, it does not go the extent that counsel seem to understand it. We do not wish to be understood as departing in any degree from the law declared to be applicable to the facts of that case. The principle there announced is that where the carrier seeks to be discharged from the duties which the law has annexed to its employment, notice alone will not be sufficient without the assent of the shipper to the attempted restriction. But it is otherwise in respect to those duties designed simply to enjoin good faith and fair dealings—a notice alone if brought home to the owner of the property delivered for carriage will be sufficient.

It will be seen there is in that case no departure from the uniform decisions of this court that a carrier can not be released from the duties and liabilities annexed to its employment unless the shipper assents to the attempted restrictions. That is apparent from the fact that it is said in the beginning of the case "the denial in the testimony that the consigners had knowledge of this condition in the receipt must be held to be overcome by the circumstances of the case." The condition to which reference is made is the limitation clause as to the amount of recovery in case of loss when no valuation of the goods is stated. On looking into the facts of the case the conclusion was fully warranted. There was in that case what is very justly characterized as unfair conduct on the part of the shippers of the goods. The box containing the goods was a small one, and had nothing on it that indicated what it contained. It was called for by the driver who collects goods for the company, and receipted for as "one case," but no information was given in any manner as to the contents or value. The receipt given was prepared by the owner of the goods, and was signed by the driver when he called for the package. The box in fact contained watches and jewelry of great value, and had the shippers disclosed the contents or value increased charges would have been exacted over the sum actually paid. There is no analogy between the facts of that case and the one at bar. The goods in this case were so put up that their nature and character were readily discoverable on the slightest examination, and were receipted for as "three bales said to contain peltries." If the testimony given can be credited, the weights and qualities of each bale were indicated on the margin of the receipt as consisting of two bales of mink and one skunk furs. It is a matter of common information that mink is among the fine furs taken in this country and that fact must have been known to the agent of defendant when he received the goods for carriage. There was, therefore, no imposition practiced upon the carrier as to the character of the goods delivered for shipment, and it can not be said the owner omitted any duty imposed by law to insure fair dealing between the carrier and the shipper unless it was the failure to make known the actual value of the goods. That fact, notwithstanding the provisions of the receipt, we think is open to explanation.

Plaintiffs offered to prove that defendant had, through its local agents, solicited his patronage on the same terms that other companies had, that is that such goods as plaintiff was known to be constantly shipping should be taken on non-valuation rates, but the court ruled it was not competent evidence. Conceding the testimony offered was true, and for the purposes of this decision it must be regarded as true, it was most important evidence tending to show why no valuation was stated. If not required to do so by express contract with defendant or by the uniform course of business with defendant and others carriers, then the plaintiffs were not bound in the first instance unless inquired of concerning the actual value of the goods to state any valuation. The testimony excluded was important for another reason as tending to show why neither party paid any attention to the limitation clause in the receipt taken for the goods. On the understanding such goods as the plaintiffs were shipping were to be and had been received and carried at non-valuation rates, neither party was interested to consider the limitation clause and that may have been the reason why plaintiffs failed to erase it or the company to insert its own name instead of the

"United States Express Company," that it might have an express agreement with plaintiffs. It is evidence, to say the least of it, that tends to show that neither party attached any importance to that clause in the receipt. Unless the limitation clause was assented to by the shippers with a view to release defendant from that liability which the law anpexes to its employment, defendant can not avail of it and that which counsel maintain as a conclusion of law is nothing more than the effect to be produced by the testimony offered to establish the fact insisted upon. As in the former cases in this court it was a question whether the circumstances in evidence overcome the denial in the testimony that the consignors had knowledge, and therefore assented to the limitations contained in the receipt, so in this case the same question arises and ought to be submitted to the consideration of a jury as any other fact in the case. On this branch of the case the testimony excluded was important and it was error to reject it.

The same question arose in Field v. Chicago, etc. R. Co. 71 Ill. 458. In that case the bill of lading was filled out by the clerk of plaintiff and as the court found the shippers had notice of the contents and assented to the restrictions therein contained, therefore the receipt or bill of landing was the contract between the parties. It is not understood there has been any departure from the doctrine of that case, that the fact the owner of the goods by himself or clerk filled up the receipt taken, is evidence tending to show the shipper had notice of the conditions, and must have assented to them. It may be true, but it is not conclusive. It is still a question of fact. Sometimes such evidence may produce conviction and justly so, as in Field's case, but cases may arise where the acts of the party may be susceptible of satisfactory explanation.

But admitting the conditious in the receipt were understandingly assented to by the shippers, and became a binding contract between the parties, still defendant would be liable for the full value of the goods if the loss was owing to negligence on the part of the railroad company. An express company choosing such a corporation to do its business, will be chargeable to some extent for the negligence of the agent employed as if the contract was primarily with such agent, on the well recognized principle that for culpable defects in carriages in use by common carriers, the law makes the carrier responsible.

The fourth charge given by the court at the instance of defendant declares the law on this subject but the court excluded from the jury testimony that had an important bearing on the decision. There was evidence tending to show that fire caused by the telescoping of the cars and although the testimony was conflicting, still there was sufficient to warrant the court in submitting that fact to the jury. Bearing directly on this important fact in the case was the testimony offered as to the efficiency of the "Miller platform" to prevent what is called telescoping of cars. Witnesses of large experience in such matters state that the "Miller platform" is regarded as adding "largely to the safety of trains," and the use of them tends to prevent breaking in the ends of the cars. One witness says he had "known the end of cars to be badly broken in collisions when they had the 'Miller platform' but never knew one car run into another." What is known as the "Miller platform" and others equally as good designed by other parties was generally known and had been in use on all the principal roads in the country long before the happening of the accident by which the plaintiffs goods were destroyed, and if such contrivances contributed materially to the safety of trains it was the plain duty of the railroad company to have adopted some one of them, and the omission to do so, if such was the case, would be negligence. All the evidence offered as to the Miller or other equivalent platforms, was excluded from the jury and this we think was error.

It may be true as counsel insist that no witness testified to the kind of platform in use by the railroad company employed by defendant or that it did not have an equivalent device or an equally safe platform. But it was proven that the railroad did not have the "Miller platform" and plaintiffs offered to prove it used the "ordinary or old fashioned platform." The objection of defendant to the giving of that testimony was sustained. Had the testimony offered as to the kind of platform in fact used by the railroad company been admitted, it would with that excluded by the court, have made the question whether the fire that destroyed plaintiffs goods was owing to the want of the "Miller platform" or other equivalent device to prevent telescoping of the cars. It was a question of fact, and ought to have been submitted to the jury as any other fact in the case.

For the errors indicated the judgment will be reversed and the cause remanded. Reversed.

SHELDON J., dissenting:

I dissent from so much of the foregoing opinion as may seem to imply that in the case of such a provision as the present, there is required in addition to knowledge, assent to it. Where the provision, as here, is for the purpose of securing disclosure of value, knowledge of it brought home to the consignor is sufficient. But when it is a simple restriction of common law liability, then there must be assent in addition to knowledge. This distinction was recognized and adopted in the Oppenheimer case. The opinion, inadvertently I think, overlooks the distinction.

RAILROADS IN STREETS — ULTRA VIRES —NEGLIGENCE.

STANLEY v. CITY OF DAVENPORT.

Supreme Court of Iowa, October Term, 1879.

In the absence of express legislative authority, a city can not lawfully grant to a street railroad company the right to operate a steam motor along its streets; and to do so is negligence which will render the city liable for injuries sustained by a person on the street by reason of the operation of the motor

Appeal from Scott County Circuit Court:

The petition states that the plaintiff while driving a horse harnessed to a wagon along and up a street in the city, and without fault or negligence on her part, was violently thrown from the wagon by reason of the horse taking fright at a steam motor then being and on said street, under the authority and permission of the defendant. It is alleged that the plaintiff is greatly injured, and a recovery is therefore sought. There were two counts in the petition. To the first there was a demurrer, which was sustained, and to which the plaintiff excepted. And refusing to plead further, judgment was rendered against her.

It was stipulated by counsel when the demurrer was submitted, that it presented for determination the following question: "Whether or not it was negligence on the part of the defendant to permit the use of a steam motor on Brady street under the written authority set out in said petition, and allowing it to remain and be used thereon." The written authority referred to is a written resolution of the city counsel granting permission to use the motor on Brady street for thirty days.

The second count, which set out a cause of action based on the use of a motor was substantially as the same was stated in the first count. There were also other acts of negligence alleged in the the second count, because of which the plaintiff claimed to recover. The defendant filed a motion to strike out of the second count allegations relating to the motor. The motion was sustained, and plaintiff excepted. But no judgment was rendered dismissing the action. The plaintiff appeals and assigns as error the action of the court in sustaining the motion and demurrer.

A. J Hirschl, for appellant; *H. M. Martin*, for appellee.

SEEVER, J., delivered the opinion of the court:

The appellee insists because no judgment was rendered on the motion other than merely sustaining it and striking out the allegations objected to, that the appeal must be dismissed. It is conceded that an appeal lies from the ruling on the demurrer, but it is stated and admitted in the abstract, the cause is pending and for trial in the court below, on the remaining cause of action in the second count. The argument briefly stated is: That an action can not be pending in this court and the court below at the same time. While here the cause may be tried below and recovery had. If so the prosecution of the appeal would be unnecessary, and that a cause can not be tried by piecemeal—a part before and another part after the appeal has been determined.

Appeals to this court are regulated by statute; by reference thereto the question presented can be readily solved. It is provided that an "appeal may be taken to the Supreme Court from an intermediate order involving the merits and materially affecting the final decision." Code, sec. 3164.

The motion involved the merits, and when it was sustained the final decision was virtually affected, for as the pleadings now stand in the court below the plaintiff can not introduce any evidence in relation to the steam motor; nor can the right of the defendant to authorize its use be controverted in this action. By sustaining the motion the circuit court has striken all allegations upon which such question can be based from the pleadings. By the express words of the statute an appeal lies in such a case. By what authority can an appeal properly taken be dismissed? None other, we think, than statutory authority. Counsel have not called our attention to such a statute and we know of none. If the remaining cause of action had been tried, it is possible, whatever might have been its result, it would be deemed a waiver of the appeal if brought to the attention of this court at the proper time. Code, sec. 3212. It is probable, also, that the court below would have the power to postpone the trial there until the appeal was disposed of. There is nothing in the record which tends to show the plaintiff has done anything since the appeal was taken which amounts to a waiver or will authorize a dismissal of the appeal. In fact, the record fails to show that an issue has been formed or that either party desires a trial below until this appeal is determined.

In 1870 the defendant granted to "The Davenport Central Railroad Company the exclusive right to lay and operate upon * * Brady * * street, in said city, a single horse railway, with the necessary side tracks." The right of the city to make this grant is not questioned. In 1878 the city granted "J. M. Davies permission to run one of Baldwin's noiseless steam motors on Brady street hill on probation for thirty days." The motor was run and operated on the track of the street railway company.

It has been held that cities have the authority to grant railroad companies who use steam in operating their roads the right to occupy with their track street or streets of the city. Milburn v. Cedar Rapids, 12 Iowa 246, and numerous other cases. These decisions were based on a statute providing "that any (railway) corparation may raise or lower any turnpike, plank road or other highway for the purpose of having its railway pass over or under the same, and in such cases said corporation shall put such highway as soon as may be in as good repair and condition as before such alteration." Code sec. 1262.

In the Milburn case the words "pass over" were construed to mean "upon" or lengthwise, and this construction has been several times followed in subsequent cases. As thus construed the legislative assent had been given to the laying down of railway tracks in streets and the operation of the same by the use of steam, subject, however, to proper equitable control and police regulations. Chicago, etc. R. R. Co. v. Mayor of Newton, 36 Iowa, 299. But it never has been held that cities had the authority to grant such privileges in the absence of a legislative grant to that effect, whatever may have been said by judges who have written opinions in the cases in which this question has been determined or discussed. It is quite apparent, we think, that all the cases subsequent thereto are based on the Milburn case, which, as we understand it, is based on the statute. It is worthy of note that, notwithstanding

the several decisions following the Milburn case, it has not been deemed satisfactory to the profession or general public. This is apparent from the numerous cases in which the doctrine of the Milburn case has been vigorously assaulted by counsel.

Finally, in 1874, the General Assembly enacted a substitute for code sec. 1262, which provides that railway corporations may "cross over or under" any highway with its railway. Chap. 47, Law 15, General Assembly. To cross over or under does not mean upon or lengthwise. Under the circumstances the legislative intent has been clearly expressed, and it is to the effect that railways operated by steam can not be constructed upon streets and highways except as provided in a section of the code hereinafter referred to. Or if this be not true, the legislative assent contained in sec. 1262 of the code has been withdrawn by the enactment of the statute of 1874. We are not called on to vindicate or condemn the wisdom of this statute. To construe or ascertain its meaning is our only province. The various decisions above referred to are not now correct expositions of the law because they have been superseded by that branch of the government whose province it is to enact, but not to construe the law.

The remaining question is whether the city had the authority in the absence of a grant from the general assembly to authorize or permit the use of the steam motor on Brady street in said city. If such power did not exist, the permission could well be styled negligence, for which the city should be held responsible. Unless the city can shield itself by reason of its authority in the premises, the permission to use the motor on the street constitutes negligence.

That it was an experiment is not material. If no power existed it matters not whether the authorized use was for a long or short period of time. The defendant was organized under a special charter, and it is stipulated by counsel that neither the charter nor ordinances of the city expressly prohibit the street railway company "from using other than animal power in operating its road." Nor does the charter or ordinances contain a grant to that effect. Therefore, we think it must be true the street railway company had no right to use or authorize the use of steam on its track. Hence the application to the city council, and the necessity that it should grant the requisite permission.

The charter empowers the defendant to "open, alter, abolish, widen, extend, establish, grade, pave or otherwise improve and keep in repair streets, avenues and alleys." That the requisite power is not contained in the charter we regard as beyond serious controversy. We feel the more certain of this because the learned counsel for the city does not claim such authority is contained therein. It may be that cities organized under the general incorporation law have such authority. If so it is because there is a statute to that effect. Code, sec. 464. Such statute, however, is not applicable to the defendant.

The fee of the streets is in the city, and yet it is held in trust for the use and benefit of the public. The city does not have the authority to sell and convey the title held by it or authorize the streets to be used for private purposes. Nor can it, without legislative authority, grant the use of a street for a public purpose, which renders it dangerous for the public to travel over it in any other manner. The power partakes of that eminent domain which, under our government, can only be granted by the law-making power of the State. Streets and highways are under the exclusive control of the general assembly. It matters not if the fee of the streets is in the city, it has no authority to control or grant rights and privileges thereto or thereon, unless it has been so authorized. The power and authority of the city is contained in its charter and bounded thereby. It has no other or different control of the streets than is prescribed in the charter or the general statutes of the State. A distinction has been drawn between a railway operated by horse and steam power, and whether the defendant may authorize the former and not the latter, is not in this case, and we only allude thereto least we be misunderstood. The strong current of the authorities, as we understand, are in accord with the views herein expressed. 2 Dillon's Municipal Corporations 567-568. Davis v. Mayor, etc., 14 N. Y. 506. Mislau v. Sharp, 27 N. Y. 611. Com. v. W. E. R. R. Co., 27 Pa., 344. Protzman v. Illinois Cent. R. Co., 9 Ind., 468. State v. Inhabitants of Newton, 36 N. J. L., 83. Memphis City R. Co. v. Memphis, 4 Coldw., 406.

It is suggested, but not pressed, in argument, that the act of the city council being without authority, the city is not responsible for any consequence resulting therefrom. The city had jurisdiction of the subject matter, that is of the streets, and could only act in relation thereto through its council. The latter had control of the streets of the city, but were mistaken as to the extent of their authority. The particular thing the council authorized to be done was illegal, and we think the city is responsible for the consequence resulting therefrom. The modern doctrine we understand to be this: Whenever an action for an injury to the property or person of another will lie against an individual, corporations will in like circumstances be equally liable for any injuries committed by their officers and agents acting within the apparent scope of their authority. It was therefore held in Lee v. The Village of Sandy Hill, 40 N. Y. 443, that the defendant was liable for a trespass committed under the direction of the village trustees. The trespass consisted in removing a fence which they erroneously supposed encroached upon the street.

In City of Pekin v. Newell, 26 Ill. 320, the city was authorized "to build and construct an embankment and plank road across the Illinois river bottom opposite said city." Instead of so doing, a pile bridge was constructed in such a negligent manner that the horse of the defendant in error fell through the bridge and was killed. The city sought to defend on the ground that the bridge was built without authority. But it was rightly, we think, held otherwise. Other authorities might be cited to the same effect. Reversed.

ADAMS, J., dissenting.

Decisions in relation to the occupancy of streets by ordinary railroads not designed for street purposes are, in my judgment, not strictly applicable to this case. A street railway, whether operated by animal, steam or other power, is not an obstruction to the same extent. It is consistent with all the legitimate uses to which a street is put, and has come to be deemed a public necessity.

In my opinion the city council may regulate the use of streets without any special grant of power in this respect, and may in its discretion with a view of promoting its public interest, allow cars to be drawn thereon for street purposes, either by animal, steam, atmospheric pressure or other power, and that, too, though the cars or motors may be such as to cause fright, to some extent, to timid horses. It must, I think, be allowed in such a case, to judge of the objectionableness, if any, of proposed cars or motors, and whether the inconvenience, if any, resulting to any persons, as causing fright to horses, would be such as to overcome the considerations of public necessity or advantage. Steam fire engines are well calculated to frighten timid hôrses, yet no one supposes that a city council could not permit them to be drawn upon a street. Many other things may be done on the streets which are calculated to frighten timid horses, but they are not necessarily to be forbidden for that reason. Private convenience must sometimes yield to what is deemed a paramount public convenience.

When the city council of defendant city granted permission to use a motor upon one of its street railways, we must presume that it did so because it considered that the public convenience demanded it; and the defendant city should not, in my judgment, be held liable for the injury resulting from the fright of plaintiff's horse. Whether a city council, without express authority from the legislature, can grant an exclusive right to operate a street railroad by the use of a motor or otherwise, or what right it can grant, if any, are entirely different questions. Upon them, I think, the decisions have not been entirely uniform. If the city council can grant no right, then an attempt to do so would be void; and the ground of the plaintiff's complaint would be simple, that the city suffered the motor to be used, but such sufferance would not, in my judgment, be negligence, because I think that a city council may exercise a discretion in relation to what it shall suffer and what it shall forbid, so long as it acts in good faith, and with a view to promoting the public convenience. I see no errer in the ruling of the circuit court.

NOTE.—A defect in the street may consist of anything that frightens horses and causes accidents in that way, as well as anything with which they come directly into contact, as where a city licensed an exhibition of bears on its streets, causing fright of a horse, and consequent injury to the driver, the city was held liable: Little v. City of Madison, 42 Wis. 652; or let a steam roller used in repairing streets remain thereon. Young v. City of New Haven, 39 Conn. 435. Or a tent in the limits of a highway. Ayer v. Norwich, 39 Conn. 380, the court saying: "A hole in the road at that place would be far less dangerous. Nine out of ten carriages might pass it without horse or driver noticing it. If seen, it could be easily avoided. * * * The tent * * was almost certain to frighten any horse driven near it, and the safety of those concerned depended largely upon the skill of the driver, or strength of the harness." And bales of hay, even on margin of highway, made it defective. See Morse v. Richmond, 41 Vt 438 (with a valuable note by Redfield J.). So, also, a pig sty projecting into a highway, the pigs scampering around therein and causing fright to horses. Bartlett v. Hooksett, 48 N. H. 20. A pile of stones in highway, Clinton v. Howard, 42 Conn. 306. A burnt log, close beside the traveled path. Foshay v. Glen Haven, 25 Wis. 289. A large rock. Card v. City of Ellsworth, 65 Maine, 551. In all these, the horses, frightened at the objects mentioned and caused injuries, no other defects existing in the street, and defendant cities or town held liable. In Woods v. Groton, 111 Mass. 358, a horse shied at a puddle of water, which had been allowed to remain in the a highway, and threw the wagon off an embankment which was not guarded by a railing; on these facts, defendant was held liable for damages; but it does not appear whether the defect consisted in the puddle, or in the want of a railing, or in both. In all the above cases, the defendants were under the same obligations, generally, as was the city of Davenport in regard to keeping streets in good order and repair, and in a sufficient condition for the public use.

A city is, of course, liable for injuries occasioned by defects in its streets, existing with the knowledge of the city. Ewell v. Greenwood, 26 Iowa, 380; Hougham v. Harvey, 33 Iowa, 204; Parks v. Chicago, etc., R. Co., 43 Iowa, 638; Dillon on Munc. Corp., sec. 770, note 2 and sec. 778; Thayer v. Boston, 19 Pick. 515; Little v. City of Madison, 42 Wis. 652.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF MINNESOTA.

[Filed Oct. 14-17, 1879.]

PUBLICATION — DESIGNATION OF NEWSPAPER.—Under ch. 1 and 2, Gen. Laws of 1874, the designation by the board of county commissioners of a county of some newspaper to publish its delinqnent tax list and the accompanying notice, is essential to a valid publication thereof, and to the validity of any judgment rendered thereon. The want of such jurisdictional fact may be shown to impeach the judgment or any sale had thereunder. The adoption by the board of a motion directing the county auditor to give the printing of the delinquent tax list to A. F. Daggett, editor of the Litchfield *News Ledger*, is not such a designation. So, also, as to a motion to give such printing "to Daggett and Joubert, editors of the Litchfield *News Ledger*." Opinion by CORNELL, J.—*Eastman v. Linn.*

DISQUALIFYING INTEREST—MOTIVES.—An ownership of land contiguous to the line of a proposed county highway which may affect or enhance the value of such land, is not such an interest as legally precludes the owner from acting as a member of the board of county commissioners, upon a petition signed by himself and others for establishing the road. As a general rule, the motives that may have influenced official conduct of members of such board can not be made the subject of practical inquiry for the purpose of impeaching their official acts. Opinion by CORNELL, J —*Webster v. Board of County Commissioners.*

RIPARIAN RIGHTS — INJUNCTION.— The riparian owner upon a navigable stream may use the water flowing past his land for any purpose, so long as he does not impede the navigation, in the absence of any counterclaim by the State, or the United States. The act incorporating the St. Anthony Falls Water Power Company does not authorize it to appropriate the water power opposite the land of any other riparian owner. For an unlawful interference with the right of a riparian owner to use the water flowing past his land, an injunction is a proper remedy. Mere delay of such an owner to assert his right does not work an estoppel. Opinion by GILFILLAN, C. J.—*Morrill v. St. Anthony Falls Water Power Co.*

TAXATION—WATER POWER—REAL PROPERTY.— The Minneapolis Mill Co. is the owner in fee of land upon the western bank of the Mississippi river at the Falls of St. Anthony, opposite which lands it has built and maintains a dam extending from each bank into the river. The company has leased to different parties four mill sites upon the dam, together with the right to use upon and at such respective sites the quantity of water in the lease specified, in all amounting to thirteen water powers, the said water and water powers being taken and used thereat directly from the main body of the said river running through said dam, and regulated by means of gates thereon. Morrill v. St. Anthony Falls Water Co., *supra*, followed as to the general rule that a riparian owner may use the waters of a navigable river (like the Mississippi) adjoining his land for any purpose, for his own advantage, so long as he does not impede navigation, and in the absence of any counterclaim by the State or the United States. The fact of this use rests upon the fact of riparian ownership; that is to say, the riparian proprietor possesses this right, because he owns the land upon the bank; or, in other words, the right is attached as an incident to the riparian land, and belongs and appertains to the same. It follows that defendant's right to the use of the water is, for all purposes of taxation, real property and not personal, since our tax law provides that real property, for the purposes of taxation, shall be construed to include the land itself and all rights and privileges belonging or in anywise appertaining thereto. Opinion by BERRY, J.—*State v. Minneapolis Mill Co.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

October, 1879.

SLANDER—ACTIONABLE WORDS—EVIDENCE.—In an action for slander by words spoken concerning the plaintiff, a married woman, the defendant offered himself as a witness, and denied that he used the words charged against him, and denied that he knew the plaintiff or mentioned her name to a third person before her marriage. *Held*, that this evidence, being competent and material, might be contradicted. 2. If the subject of the discourse in relation to a female is chastity, the use of the word "bad" might import the want of conjugal fidelity, if the woman were a married woman; and when the charge against a married woman is that she is a bad woman, a bitch and a whore, the court can not say, as matter of law, that the word bad does not import a want of chastity, but it is for the jury to determine the sense in which the word was used. Opinion by LORD, J.—*Riddel v. Thayer.*

TAX — CONTRACT FOR SALE OF PERSONAL PROPERTY—TITLE.—In an action of contract to recover a tax assessed May, 1 1875, to the defendant, as administratrix of her husband, for a stock of merchandise, it appeared that on April 28, 1875, an agreement was signed and delivered by J. M. & Co. to the said administratrix, which recited that the defendant "sells" and J. M. & Co. "buy" said stock, and provided that "the price is to be seventy-five per cent. of the invoice prices of the goods, according to the inventory in the possession of the administratrix, subject to corrections as to qualities. Delivery to be made and price paid as soon as the quantities can be verified." The clerks of the defendant retained the key of the store until the examination and verification was complete, and until the goods were removed on the fifth or sixth of May to the store of J. M. & Co. *Held*, that the defendant was the owner of the goods on the first day of May, and was liable for the tax assessed thereon. Higgins v. Chessman, 9 Pick. 7, 10; Dresser Manf. Co. v. Watterson, 3 Met. 9, 17, Macomber v. Parker, 13 Pick. 175: Mason v. Thompson, 18 Pick. 305; Riddle v. Varnum, 20 Pick. 280; Foster v. Roper, 111 Mass. 10, 16. Opinion by GRAY, C. J.—*Sherwin v. Mudge.*

CRIMINAL LAW — STATUTE — CONSTRUCTION OF "SIMILAR OFFENSE."—The defendant was convicted under the Gen. Stats., ch. 87, secs. 6, 7, upon a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors. When he was brought before the court for sentence, it appeared that he had been previously convicted under statutes of 1875, ch. 99, of illegally keeping intoxicating liquors for sale, and that he had not previously been convicted of any other offense claimed to be similar to the one charged in this complaint. The court ruled, as a matter of law, that, under the statute of 1866, ch. 280, providing that "when it is provided by law that an offense shall be punished by a fine and imprisonment in the jail, or by a fine and imprisonment in the house of correction, such offender may, at the discretion of the court, be sentenced to be punished by such imprisoument without the fine, or by such fine without the imprisonment, in all cases where the offender shall prove or show to the satisfaction of the court, that he has not before been convicted of a similar offense," it had no discretion to impose a fine without imprisonment, or imprisonment without a fine, but was compelled to impose a sentence of both fine and imprisonment: *Held*, that the two offenses were distinct and different; the gist of one is the keeping and using a tenement for an illegal purpose, which makes it a nuisance; of the other, doing certain acts which constitute an offense, but which do not necessarily involve the keeping of any tenement or building. The word "similar" is often used to denote a partial resemblance only, but it is also often used to denote sameness in all essential particulars. We think the legislature intended to use it in the latter sense in the statute we are considering. Opinion by MORTON, J.—*Com. v. Fontain.*

SUPREME COURT OF VERMONT.

[Advance sheets of 51 Vt.]

CONTRACT—IMPLIED PROMISE.— Plaintiff proposed to defendant that he take plaintiff and his wife to board, and, as defendant's wife, who owned the place where she and defendant lived, wished to repair and alter her house before taking them, offered to let defendant have money for that pupose. He accordingly paid defendant money to be so expended, and aid money for labor and materials so used, and de-

livered to defendant certain wood, hay, grain and sugar. Defendant was then insolvent, and known by plaintiff to be so, and he never expressly promised plaintiff to pay him for any of the charges, but plaintiff expected to be paid in full, either by board, or by board and money from defendant's wife, to make up the deficiency. *Held*, that as the money, etc, expended on the house, was furnished not at the request, nor for the benefit, nor on the credit of the defendant but on the credit of the wife, and for her benefit and the benefit of her separate property, the law would imply no promise on defendant's part to repay it, but that as the wood, etc., was furnished to defendant for the use of his family, it was for his benefit, and the law would imply a promise on his part to pay therefor. Opinion by ROSS, J.—*Roberts v. Kelly*.

FORGERY — INDICTMENT — NECESSARY ALLEGAGATIONS—MEANING OF "ACQUITTANCE.—1. A writing in the common form of a receipt, for money paid as part of the purchase money of a farm, is an *acquittance* within the meaning of sec. 1, ch. 114, Gen. Sts., providing for the punishment of those who alter, forge or counterfeit acquittances or discharges for money or other property. "The word acquittance, although perhaps not strictly speaking synonymous with receipt, includes it. A receipt is one form of an acquittance; a discharge, another. It is not questioned but that a receipt in full is an acquittance. Why, therefore, is not a receipt for a part of a demand or obligation an acquittance *pro tanto*? We are aware that lexicographers do not fully agree as to this; but, in legal proceedings, a receipt is regarded as an acquittance. See 2 Bishop Crim. Law, sec. 557; Rex v. Martin, 8 C. & P. 549; Regina v. Houseman, 8 C. & P. 180; Regina v. Atkinson, 1 Car. & M. 325; Com. v. Ladd, 15 Mass. 526; Wharton Prec. Ind. 383." 2. An indictment in two counts for altering, forging, and counterfeiting such a receipt, set out the receipt in full, but alleged no dealings between the respondent and the receiptor showing that the receipt could have been used to defraud, nor that the receipt alleged to have been altered was ever delivered to the respondent as an acquittance, or ever held by him as such. *Held*, that allegations of extrinsic facts were necessary only where the operation of the instrument on the rights of another was not apparent from the instrument itself; and that allegations such as were wanting in the indictment were unnecessary. Opinion by DUNTON, J., *State v. Shelters*.

SUPREME COURT OF INDIANA.

[Filed October, 1879.]

EXCHANGE OF PERSONAL PROPERTY — MEASURE OF DAMAGES FOR DEFECT — COUNTER-CLAIM.—Suit by appellant upon a promissory note. Answer by way of counterclaim, that appellee was the owner of a Howe sewing machine of the value of $55, and that appellant agreed to exchange a higher price machine for that belonging to appellee, taking the note in suit for the difference; that the machine received by appellee in the exchange was worth less, etc. The appellee had judgment for $32. The error assigned on appeal was the refusal of the court to give the following instruction: "The third paragraph of the answer is similar to the second, except that it is pleaded as a counterclaim; no warranty is alleged, nor any fraud, but simply a failure on the part of the plaintiff to comply with a contract which he alleged to exist, whereby the machine traded for had become worthless, and the defendant seeks to recover as damages the price of the machine given in exchange, and to defeat the note given for the difference. The plaintiff is only entitled to recover on this paragraph the actual damages sustained by the breach. If you find that he still retains the machine for which he traded, and that the same could have been repaired so as to work according to contract, then his measure of damages would be simply the cost of such repairs, which he would be entitled to have deducted from the note. If you find, however, that the plaintiff has never refused to repair the machine on request, or that the defendant never requested the plaintiff to furnish him a new one, then your verdict should be for the plaintiff on this paragraph:" *Held*, that the instruction contains a fair statement of the law applicable to the case made by the appellee's counterclaim and the issue joined thereon. 29 Ind. 142; 44 Ind. 490; 58 Ind. 438. Reversed.—*Howe Machine Co. v. Reber*.

SURVIVAL OF ACTIONS—STATUTE OF LIMITATIONS—PLEADING.—This was a suit by Boles against Walter and Henry Baugh to have a certain deed declared void, and to subject the real estate conveyed thereby to sale for the payment of a debt due from Henry Baugh to the plaintiff. The complaint stated that in 1851 Henry Baugh was appointed guardian of certain minor heirs, and gave bond with the plaintiff as his surety; that he received certain moneys of his wards, and afterwards purchased real estate, the deed for which he did not put on record; that becoming involved in debt he destroyed the deed and procured the grantors to execute another for the same real estate to his son Walter, for the purpose of defrauding his creditors, and that no consideration passed from Walter to Henry other than natural love and affection; that, afterwards, being threatened with suit by the wards of said Henry, as surety on his bond, plaintiff paid said wards the amount of their claim; that Henry had been absent from the State for fifteen years, and was presumptively dead, and that Walter was his sole heir at law. The complaint prayed that the deed to Walter might be set aside and the property sold for the beuefit of creditors. A demurrer to the complaint was overruled, and on trial the jury gave a verdict declaring the conveyance fraudulent and ordering the real estate to be sold. *Held*, that the complaint did not state facts sufficient to constitute a cause of action against Walter Baugh. It failed to allege the date of the deed, but shows that Henry Baugh left the State fifteen years prior to the suit, and that he left after the execution of the deed. When the complaint shows that the cause of action is within the statute of limitations and is not within any of the exceptions contained in the statute, it is bad on demurrer. 46 Ind. 231; 55 Ind. 347. The complaint in this case shows that the cause of action was apparently within the statute, but does not show that it is not within any of the exceptions contained in the statute. It was not therefore bad on this ground. Henry Baugh, although a party to the suit, was presumptively dead. After the lapse of five years the appellee could have procured the appointment of an administrator of his estate, and obtained an order for the sale of the real estate. Appellee's cause of action was a claim against Henry, and survived against his personal representatives and not against his heirs at law. He can not maintain an action against Walter as the heir at law of Henry, until there has first been an administrator, under the law, of said decedent's estate. 59 Ind. 510; 66 Ind. 66, 245. Reversed. Opinion by HOWK, J. —*Baugh v. Boles*.

DECEDENT'S ESTATES—SET-OFF AGAINST CLAIMS OF.—This was an action by Convery as administrator of the estate of Gerhard Ruter, deceased, against

Landon, for a balance alleged to be due on settlement of accounts. The complaint alleged that on June 16, 1877, there was a settlement of mutual accounts between decedent and Landon, and there was found to be due the decedent $57. The decedent died intestate in July, 1877. The defendant admitted the indebtedness, but averred that on April 10, 1877, at request of decedent, he signed a note jointly with him, which note he was compelled to pay August 10, 1877, and that in September, 1877, he filed a claim against the decedent's estate for the amount thus paid, which claim was allowed by the court. Defendant asked that so much of his judgment as was necessary might be set-off against the plaintiff's claim. A demurrer to this answer was overruled. Plaintiff replied that the defendant's judgment was not a preferred claim against decedent's estate, and that said estate was insolvent. A demurrer to this reply having been sustained, there was judgment in favor of the defendant. *Held*, that to entitle a defendant to plead a set-off to an action against him by an executor or administrator, his cross-demand must have been been an existing demand against the testator or intestate at the time of his death. It is not necessary that the cross-demand thus existing in favor of the defendant should have become due at the time of the testator or intestate's death; it is sufficient if it became due and payable in time to be pleaded as a set-off in the same manner as if the testator or intestate had lived to bring the action. Waterman on Set-off, § 97; 3 Barb. 166. The contingent liability which Langdon incurred when he signed the note as surety of Ruter did not constitute, in any proper legal sense, an existing demand against Ruter at the time of his death. 6 Ohio, 35; 2 Hill. (N. Y.) 210; 20 Johns. 137; 8 Wend. 530; Wat.er on Set-off, 197. The court erred in overruling the demurrer to the answer. Reversed. Opinion by NIBLACK. J,—*Convery v. Landon.*

SUPREME COURT OF OHIO.

December Term, 1878.

[Filed October 21 and 28, and November 4, 1879.]

DEED—EVIDENCE OF DELIVERY—ESTOPPEL.—1. Although there may have been no manual delivery of a deed, nor anything said, in terms, about its delivery, yet the fact of delivery may be found from the acts of the parties preceding, attending and subsequent to the signing, sealing and acknowledgment of the instrument. 2. Where real estate is conveyed by a husband to his wife, through the intervention of a trustee, the destruction of the unrecorded deeds by the husband, with the assent of the wife and the trustee, will not of itself estop the wife, as against the grantor's heir, to claim the land under such conveyance. Judgment reversed and cause remanded. Opinion by OKEY, J.—*Dukes v. Spangler.*

FORGERY—INDICTMENT—RECEIPT.—1. Where, in an indictment for uttering a forged receipt, the instrument set out is not *prima facie* a receipt, such intrinsic facts must be averred as are necessary to show that the instrument would, if genuine, have the operation and effect of a receipt. 2. An averment that the instrument set out was a receipt does not have the effect to change its *prima facie* character. Nor will the character of the instrument be changed by an averment that by the rules of the bank where the instrument was used, it was upon its face a receipt. It should be shown how or in what way, the instrument, if genuine, would, under the rules of the bank, have the operation and effect of a receipt. Judgment reversed and cause remanded. Opinion by WHITE, J.—*Henry v. State.*

BOARDS OF EDUCATION—NO POWER TO LEASE PUBLIC SCHOOL HOUSE.—Under the act of May 1, 1873, entitled "an act for the reorganization and maintenance of common schools" (70 Ohio Laws, 195), boards of education are invested with the title to the property of their respective districts in trust for the use of public schools, and the appropriation of such property to any other use is unauthorized. 2. A lease of a public school house for the purpose of having a private or select school taught therein for a term of weeks, is in violation of the trust; and such use of the school house may be restrained at the suit of a resident tax-payer of the district. Judgment reversed. Opinion of MCILVAINE, J.— *Weir v. Day.*

COUNTY COMMISSIONERS—WHEN AUTHORIZED TO SUE IN OWN NAME—ACTION TO RECOVER BACK—1. The capacity of county commissioners to sue is not limited to the cases enumerated in section seven of the "act establishing boards of county commissioners and prescribing their duties." In the cases enumerated in section seven they are not only authorized but required to sue. 2. Where a cause of action in favor of the county arises out of a subject-matter within the control of the board of county commissioners, suit may be brought thereon in the name of the board, unless, by statute, the suit is required to be brought in some other mode. 3. Where work has been done on account of the county, under an agreement with the commissioners, and has been accepted and paid for, no action lies at the suit of the commissioners, in the absence of fraud or mistake, to recover back the money thus paid. 4. In such action, where it is averred in the answer that the work was done on account of the county, in pursuance of a contract with the commissioners, the presumption is that the contract was duly entered into. If the alleged contract is sought to be impeached by the reply as being void as against the county, for non-compliance with the requirements of the act of March 9, 1866, relating to the duties of county commissioners (S. & S. 86), the reply ought to show that the subject-matter of the contract is within the purview of that act. Whether if the contract were shown to be made in contravention of the act last named, it would make any difference as to there being no right to recover back the money, *quære*. Judgment affirmed. Opinion by WHITE, J.—*Comrs. of Hamilton Co. v. Noyes.*

SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, October, 1879.]

PRACTICE—CHANGE OF VENUE—AFFIDAVIT MUST BE FILED—CHANGE OF VENUE ON CONDITION—FAILURE OF DEFENDANT TO PERFORM CONDITION.—This was an action of debt on an appeal bond. At the time to which the summons was returnable, but before a default was taken. the appellants filed a motion for a change of venue, but without petition or affidavit. On June 18th, the court entered an order with the following words: "All pleas to be filed by to-morrow morning," and on the 19th of June defendants were defaulted for want of pleas. Immediately thereafter appellants filed a petition accompanied by affidavit for a change of venue. The court made an order June 22d changing the venue on condition that appellants should pay to the clerk the costs of such change by Friday, June 29th. This was not done, and on June 29th the court made an order vacating the order changing the venue for non-compliance with its terms. The appellants then moved to set

aside the default entered against them on June 19th, which the court overruled, and entered judgment against appellants. DICKEY, J., says: "Appellants did not in the first instance proceed properly to obtain a change of venue. The application should have been made by petition verified by the affidavit of the petitioner. The default of appellants entered on June 19th were properly entered, for no pleas had been entered, and no sufficient application for a change of venue had been made. * * * Appellants having failed to pay the costs of changing the venue within the time limited by the court, the order granting the change of venue became as against appellants void by operation of the statute. Sec. 13, ch. 146, Rev. Stat. of 1874. The motion to set aside the default was not based upon an affidavit of merits." Affirmed.—*Little v. Allington.*

PRACTICE — APPEAL FROM APPELLATE TO SUPREME COURT — FORCIBLE DETAINER DOES NOT INVOLVE TITLE TO PROPERTY.—This was an action of forcible detainer brought before a justice of the peace in Cook county. A judgment was recovered against defendant, who appealed to the superior court where, on motion of appellant, the appeal was dismissed. A motion to set aside the order dismissing the appeal was overruled, and the case was removed to the Appellate Court, where the judgment of the superior court was affirmed, and an appeal to this court was granted and perfected, and the question is presented whether the statute regulating practice in the Appellate Court authorizes an appeal in such a case to this court. The Court say: "The 91st section of the practice act, as amended in 1877, provides that 'in all criminal cases and in all cases where a franchise or freehold, or the validity of a statute is involved, and in all other cases where the sum or value in the controversy shall exceed $1,000,' &c., appeal shall lie to this court. Nor is it perceived that it conflicts with the provisions of section eight of the act establishing the appellate court in the class of cases to which this belongs. It specifies the cases in which appeals lie to this court from the superior court, but it does not embrace this case. It will be seen that appeals to this court from the circuit, superior or city courts in this class of cases, are not embraced in either of these sections. A proceeding in forcible detainer does not involve or call in question the title to land. In such a proceeding the title can not be called in question or tried, but simply to try and determine whether the lease of the tenant has determined and whether the landlord is entitled to possession of the premises and the tenant withholds them from him." Appeal dismissed.—*McQuirk v. Burns.*

PRACTICE — JUDGMENT FOR AMOUNT ABOVE JURISDICTION OF JUSTICE—REMITTITUR—INDEFINITE JUDGMENT.—This was a suit brought before a justice of the peace on a promissory note. Plaintiff obtained judgment, and defendant appealed to the circuit court. On the trial there plaintiff obtained a verdict and judgment for $205.79. A motion for a new trial was entered and plaintiff remitted $5.79, and the motion was overruled and a judgment entered ordering that plaintiff recover the amount of the verdict less the amount remitted by plaintiff, &c. Defendant appeals to this court and urges two principal objections to the judgment rendered: 1st. That it is for an amount beyond that claimed by the indorsement on the summons and above the jurisdiction of the justice of the peace. 2nd. That it is so uncertain that it must upon that reason be reversed. WALKER, J., says: "As to the first objection see the cases of Tindal v. Meeker, 1 Scam. 137, and Micheltree v. Sparks, 1 Scam. 198. In regard to the second point urged by defendant, we fail to perceive any uncertainty as to the amount. We apprehend that no person on reading it would say it was uncertain, but all would say it was for $200 and costs. It says it is for $205.79, less the sum of $5.79 remitted as aforesaid, which is a statement that it is for $200. But it is urged that the case of McCausland v. Wonderly, 56 Ill. 410, must control this case. This we regard as a misconception of the facts of the two cases. In that case the plaintiff expressed a willingness to remit $600 of the verdict, but a *remittitur* was not entered. So that case can not be held to govern this. The case of Rothberger v. Wonderly, 66 Ill. 390, is referred to as an authority on this question. That case was like the one first referred to and can not control this. The case of Farr v. Johnson is also referred to by appellant. In that case a written *remittitur* was filed, but a judgment was rendered for the full amount of the verdict, 'subject to the aforesaid *remittitur*.' Thus it will be seen that the language of that judgment and the one under consideration is different. We think there is a well-founded distinction between these cases, those referred to being uncertain and indefinite in the judgment rendered. We are unable to see that Linden v. Monroe, 33 Ill. 388, has any bearing on the question." Judgment affirmed.—*Guild v. Hall.*

MECHANICS LIEN — CROSS-BILL BY DEFENDANT TO RECOVER DAMAGES NOT ALLOWABLE—CLAIM BY DEFENDANT MUST BE MADE IN SEPARATE SUIT.—This was a petition under the statute to enforce a mechanic's lien against the property described in the petition. Incidentally, the petitioners ask for the production of the building contract, in the possession of the defendants, to use in the suit as well as a common law proceeding between the parties. Defendants filed an answer, alleging that they have sustained damages in amount greatly in excess of any sum due petitioner, by reason of the non-completion of the building within the time specified in the contract. They also filed a cross bill, in which they recite the principal facts stated in the answer, and ask for a personal decree in their favor against petitioners, and ask also to have the common law suit commenced against them by petitioner, enjoined. Plaintiff demurred to the answer and cross-bill. Court below sustained demurrer. SCOTT, J., says: "Proceedings to establish a mechanic's lien are against the property to be affected. Such proceedings are strictly statutory, and without the aid of the statute can not be maintained. Whatever defense defendants have may be made in the answer, and whatever defeats the lien puts an end to the whole proceeding, and the petition must be dismissed. In case it shall appear that petitioner is entitled to no lien to be enforced against the property, he will be entitled to no relief whatever. The party will be remitted to his appropriate action at law. It is not denied, if any defense exists, defendants on their answer could defeat the lien sought to be enforced against their property. The object of what is termed a cross-bill here, is not alone to defeat the lien which petitioners are endeavoring to establish, but to have a personal decree against petitioners for the damages they say they have sustained by reason of the non-fulfillment of the building contract, and to have certain suits pending at law growing out of the same subject-matter perpetually enjoined. This we do not think can be done. The defense to the common law actions, whatever it may be, can be made in the court where the same are pending, and there can be no reason for assuming jurisdiction on that ground. Demurrer properly sustained." Affirmed.—*McCarthy v. New.*

QUERIES AND ANSWERS.

QUERIES.

40. IN SUIT FOR A DIVORCE the plaintiff alleges that her husband has been convicted of a felony, and is imprisoned in the State penitentiary, which the records show. Is it necessary, (under the Kansas statutes) to have personal service upon the defendant to insure the validity of the decree. J. K. O.

41. HOMESTEAD LAW.—The statutes of Illinois provide: "That every householder having a family shall be titled to an estate of homestead to the extent in value of $1,000, in the farm or lot of land and the buildings thereon, owned or rightly possessed, by lease or otherwise, and occupied by him or her as a residence; and such homestead, and all right and title therein, shall be exempt from attachment, judgment, levy or execution, sale for the payment of his debts, or other purposes, and from the laws of conveyance, descent and devise, except as hereinafter provided." (Hurd's Statutes, 1877, ch. 52, sec. 1.) "But no property shall, by virtue of this act, be exempt from sale for non-payment of taxes or assessments, or for a debt or liability incurred for the purchase or improvement thereof." (Ibid sec. 3.) "The same articles of personal property which are, by law, exempt from execution, except the crops grown or growing upon the demised premises, shall also be exempt from distress for rent." (Ibid ch. 80 sec. 307. In that State A. leases a lot of B. for a term of years, on which the tenant erects a dwelling in which he and his family reside. During the term B. issues a distress warrant for rent in arrear and levies it upon the house, the value of which is less than $1,000. Is the house exempt from this process? X.

ANSWERS.

37. We have been requested to say that the query No. 36 (9 Cent. L. J. 339) was incorrectly stated. It is correct down to the word "adopted." From there A and B should be transposed, and it should read "A was duly naturalized fifteen years ago. Can B sue etc." On referring to the copy of the query as sent us, we find that the mistake was that of our correspondent.—ED. CENT. L. J.

NOTES.

The Governor of California has appointed F. P. Stoney, I. S. Belcker and A. C. Freeman, commissioners to draft such laws and amendments to the codes as in their judgment are necessary to make the system of codes and statutes conform to the requirements of the new Constitution of that State. Mr. Freeman is well-known as a legal writer and as a contributor to this JOURNAL.——The St. Louis Court of Appeals have just held that slander is not an indictable offense in Missouri, in an opinion which we shall publish next week.——This is the manner in which the judges went on circuit in Ireland a hundred years years ago. The judges were in the saddle early on traveling days, and not unfrequently their wives rode on pillions behind them, At the appointed hour the bugle sounded; the high sheriff with a score of halbermen in livery, waited outside the judge's lodgings. The bar was collected, each barrister having his circuit library and clothes stowed away in the saddle bags on his servant's horse, while a couple of huge leathern bottles well filled with claret dangled at his horse's flanks. His flowing cloak, which in winter covered the horse and the rider, was in summer rolled in military style at the crupper of the saddle, while at the bow were the horse pistols, ready at any moment to protect his life, if attacked by the gentlemen of the road, or his honor, if wounded by real or imaginary insults. The sub-sheriff followed the bar at a short distance, and the whole of this moving mass dashed on at a brisk trot while a squadron of dragoons brought up the rear.

In one of the Western States a case was lately tried at the termination of which the judge charged the jury, and they retired for consultation. Hour after hour passed and no verdict was brought in. The judge's dinner hour arrived and he became hungry and impatient. Upon inquiry he learned that one obstinate juryman was holding out against eleven. That he could not stand, and he ordered the twelve men to be brought before him. He told them that, in his charge to them, he had so plainly stated the case and the law that the verdict ought to be unanimous, and the man who permitted his individual opinion to weigh against the judgment of eleven men of wisdom was unfit and disqualified ever again to act in the capacity of juryman. At the end of this excited harangue a little, squeaky voice came from one of the jurymen. He said: "Judge, will your honor allow me to say a word?" Permission being given he added: "May it please your honor, I am the only man on your side."

——There are many peculiarities in the Swedish procedure, some of which recall the original character of certain portions of our own system. The court of first instance in town is the council-house court, which consists of the burgomaster or mayor and his assessor. In the country it is the district court, constituted by district judge and twelve men (farmers or householders) specially summoned from the locality. These are not sworn, nor are they in any way recognized as judges of the charge. They merely act as witnesses of the proceeding, to preserve the principle of publicity. The judge alone decides. But if the twelve men unanimously differ from him, their decision prevails. The tribunals of the second instance are constituted of the high courts, of which there are three—one for the province of Svea, at Stockholm; for Gotha, at Jonkoping; and for Scania and Blecking, at Christianstad. The jurisdiction of these courts extends over all courts of first instance in their respective provinces, both in civil and criminal matters. They also act as courts of first instance in all charges of official misconduct brought against magistrates and other officials The final court of appeal, or highest court, holds its sittings in the Castle of Stockholm, and pronounces its judgments "in the name of the King." Its members, styled councillors of justice, are sixteen in number and are divided into two divisions. In military cases two higher officers are added as assessors. The King has the right of taking part in the proceedings of this Supreme Court; when he doers, he has two votes. Should members of this Council of State or of the Supreme Court be charged with official misconduct, the Constitution provides that they are to be arraigned before a special court, called "Court of the Kingdom." But this court has never yet had occasion to exercise its functions. The jury is only employed in press cases.